Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
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Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)))	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)))	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	))	CC Docket No. 98-147
	)	

To the Commission:

COMMENTS

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby responds to the Notice of Proposed Rulemaking ("*Notice*") issued by the Federal Communications Commission ("Commission" or "FCC") in the above-captioned proceedings.[1] CompTel is the premier industry association representing competitive telecommunications providers of all types, their partner suppliers, and their service partners. CompTel's member companies include the nation's leading providers of competitive local exchange services and span the full range of entry strategies and options. The fundamental mission of CompTel is to protect and advance the interests of its member companies so as to ensure the survival and prosperity of the competitive telecommunications industry in the United States and oversees. As a result, CompTel has a direct interest in the ability of its members to obtain full and non-

[1] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001) ("*Notice*").

discriminatory access at cost-based rates to unbundled network elements ("UNEs"), both alone and in combinations, as required by Congress in Sections 251(c)(3) and 252(d)(1) of the Communications Act of 1934.

INTRODUCTION AND BACKGROUND

The FCC's overriding objective in this proceeding should be to determine how best to promote local competition. The Commission is being presented with two dramatically different sets of proposals for achieving that goal – one by the incumbent local exchange carriers ("ILECs"), and another by competitive new entrants. The FCC's task is to determine which proposal actually will promote local competition. This is an easy task. The ILECs stand to lose market share, customers, traffic and revenue if local competition flourishes. Fiduciary duty and business self-interest require them to make proposals that, if accepted, will have the effect of killing local competition. That is exactly what they have done. If the Commission accepts the ILECs' proposals, it can only be because the FCC has a death wish for local competition. If the FCC truly wants to promote local competition rather than merely paying lip service to the ideal, it would listen closely to the entities who must accept the considerable risks of entering the local market to compete against the incumbent monopolists. CompTel speaks for those entities, and it is filing these comments to recommend actions the Commission should take in this proceeding to promote local competition through the robust UNE regime embodied in Sections 251(c)(3) and 252(d)(1).

Several statements in agency decisions and the speeches of Commissioners reveal a prevailing sentiment within the FCC that giving new entrants unfettered access to UNEs would harm facilities-based local competition. This is a ridiculous falsehood propagated by the ILECs, and CompTel is surprised that the Commission is taking it seriously. Congress adopted a strong

UNE statutory regime in 1996 because it knew that UNEs would promote local competition and long-term investment in alternative facilities by non-incumbent carriers. The Commission adopted a strong UNE regulatory regime in 1996 because it knew that this regime would play a critical role in promoting local competition. The ILECs have poured hundreds of millions of dollars into legislative and regulatory efforts to tear down both regimes because they know that by doing so they will kill local competition and protect their legacy monopolies. The empirical and policy truth is this – new entrants need non-discriminatory access to the full range of UNEs at TELRIC-based rates so that they can establish the market presence (*e.g.*, brand name, customer base, revenue stream, back-office systems) necessary to implement a long-term entry strategy, including the development of facilities-based alternative networks.

Another critical empirical and policy truth is this – it is not the goal of every new entrant, nor should it be, to construct a ubiquitous, redundant local exchange network. For decades the Commission has correctly recognized that the public interest is supported by many types of competitors, ranging from hybrid carriers who rely in part upon their own facilities, equipment and capabilities, to pure resellers who rely upon marketing prowess and efficient operations to offer consumers lower rates through aggregation and arbitrage. Ultimately, the Commission should leave it to the marketplace to sort out the optimum mix of competitive entry through self-provisioning, UNEs and resale. The Commission should not view its role as imposing an industrial policy on the country to promote short-term facilities-based entry while discouraging other forms of entry that the FCC somehow views as less worthy. In CompTel's view, any form of competition that delivers lower prices, more choices, more services, or greater innovation to consumers should be strongly encouraged.

The Commission also should not forget that most if not all new entrants over the past six years invested significant sums in facilities and business operations in open reliance on the UNE regime adopted by Congress as well as the FCC's implementing rules. Those remaining new entrants (many of whom secured funding in the past few years) are now implementing build-outs plans of five years or longer, and most need several more years to achieve financial viability. Although the Commission claims to desire to promote facilities-based entry, it would send precisely the opposite signal to the investors and new entrants were the Commission to pull the rug out from under the remaining entrants by removing or phasing-out the UNEs these entrants need to implement their business plans. The Commission is in no position to pass judgment on the business plans of these entrants, nor does the Commission have the authority to require these entrants to modify their business plans at this late date to accommodate the agency's new-found policy proclivities.

The statutory UNE regime is the heart and soul of the Telecommunications Act of 1996. The UNE regime embodies Congress' understanding that competitive carriers must be entitled to share the existing ILEC infrastructure, which was created during a state-protected monopoly and paid for with monopoly rents, in order to facilitate long-term competition. The *UNE Remand Order* laid the necessary regulatory foundation for the development of competition, which had been stalled by years of litigation and intransigence by the ILECs. In reliance upon the 1996 Act and *UNE Remand Order*, numerous competitive carriers invested billions of dollars in the U.S. telecommunications market sector. Nevertheless, during the last 18 months, the development of local competition has faltered badly. Many competitive carriers have gone into bankruptcy, while surviving competitive carriers have experienced financial challenges, declining share prices, and a drying-up of capital investment. Few if any competitive carriers have been able to sustain operations for a significant period on a cash-flow positive basis.

Although the general economic downturn has contributed to the problems facing local competition, the single most important cause is the ILECs' persistent and widespread refusals to implement the UNE provisions in the 1996 Act and the Commission's implementing rules. Among other things, the ILECs have refused to provide mandatory UNEs; engaged in delayed, inept and error-riddled UNE provisioning; developed critical OSS functionalities that are expensive, unwieldy, and error-prone; discriminated overtly and repeatedly in favor of their affiliated enterprises; charged UNE prices that exceed the statutory TELRIC standard in many states; refused to provide UNE combinations; and sabotaged competitive carriers' offerings in violation of Commission rules through unlawful and anti-competitive "winback" efforts.

The Commission's response to the ILECs' misconduct has been disappointing to say the least. With respect to enforcement, formal complaints rarely yield swift decisions, and the outcome is frequently little more than a modest fine, which the ILECs are more than willing to pay as the price for squelching local competition. Agency-initiated enforcement is virtually non-existent for local competition matters. Further, even when presented with evidence by third-party auditors of violations of FCC rules and merger conditions, the Commission more often than not has chosen to ignore this evidence despite receiving letters from CompTel and other members of the public urging the Commission to act on these publicly-disclosed violations. With respect to needed regulatory reforms, several critical rulemaking issues for promoting local competition (*e.g.*, EELs and the UNE Platform) have been lost for years in a never-ending cycle of *ex parte* meetings and ILEC delay tactics. The Commission's inaction has been particularly harmful for the enhanced extended link ("EEL"), which, if made broadly available at cost-based rates, could significantly stimulate long-delayed local competition. Instead, the Commission has agreed to ILEC demands to impose severe restrictions on EELs – contrary to the express terms of the 1996 Act and the Commission's prior UNE decisions – solely to protect the ILECs' monopoly interstate access revenue streams.

Against this backdrop, the Commission announced in the *Notice* not only that it would conduct the triennial review as promised in the *UNE Remand Order*, but also that it was re-opening virtually all UNE issues that have previously been decided. The *Notice* even goes so far as to suggest that it is an open question as to which parties have the burden of proof to justify modifying the Commission's existing UNE rules. (For the record, as CompTel notes below, it is standard administrative practice in liberalized countries for the party desiring to modify or remove a rule to bear the burden of producing sufficient record evidence justifying the change.) Coupled with pointed questions about the benefits of deregulating the ILECs and the need to establish policies favoring short-term facilities investment (regardless of whether it actually will occur), CompTel is concerned that many of the important questions in this proceeding may have been predetermined by the Commission. CompTel sincerely hopes that this is not the case, for the ILECs' proposals will surely destroy local competition, as they are, in fact, intended to do.

If rigorously implemented, the UNE regime established in Sections 251(c)(3) and 252(d)(1) can be a powerful engine for delivering the benefits of local competition to all Americans. In his recent book, <u>The Future of Ideas</u> (Random House, 2001), Professor Lawrence Lessig argues that the Internet represents a type of public "commons" that maximizes innovation, growth and competition. Professor Lessig warns that the Internet is being balkanized and leashed – and ultimately stripped of its capacity to operate as a "commons" – according to the proprietary interests of various industry participants. In CompTel's view, Congress adopted the

UNE regime in Sections 251(c)(3) and 252(d)(1) so that the ILECs' local exchange networks would be a type of telecommunications "commons." Congress intended for all carriers to be able to access and use the functionalities in the ILECs' local exchange networks at cost-based rates for the provision of any telecommunications services in order to promote innovation, growth and competition. It is imperative that the FCC adopt UNE rules that implement, rather than subvert, Congress' intention that the ILECs' local exchange networks should operate as neutral platforms that new entrants can freely use to develop and provide services to consumers.

I. CONGRESS BASED THE 1996 ACT ON THE ASSUMPTION THAT MAKING UNEs AVAILABLE WOULD FOSTER LONG-TERM COMPETITION AND INVESTMENT IN ALL TYPES OF FACILITIES

The *Notice* is littered with questions which suggest that the Commission now believes that competition matters only when new entrants install their own facilities at the outset, and that deregulating the ILECs is the only way to create incentives for the ILECs to make further network investments. These questions are disturbing for two reasons. First, the assumptions upon which the questions are based are simply false. All forms of competition benefit consumers of telecommunications services, including when competitive carriers rely in part or in whole on the ILECs' facilities and services. Likewise, requiring incumbents to make UNEs available to new market entrants creates incentives (not disincentives) for investment by fostering competition, without which incumbents have no incentive to expand their networks or create new services. Second, the Commission's assumptions are invalid, and may not form the basis of regulatory action, because they are fundamentally inconsistent with the Congressional assumptions underlying the 1996 Act.

In passing the 1996 Act, Congress unequivocally rejected the idea that deregulating the ILECs, and particularly the Bell Companies, would encourage new entrants to build competing facilities. Congress recognized in 1996 that new entrants would need to share the ILECs' monopoly local networks in order to sustain entry into the local market. For this reason, Congress required the ILECs to provide interconnection, UNEs, local exchange resale, and collocation to new entrants at cost-based rates.[2] Further, Congress recognized that the ILECs would need to incur substantial costs and allocate significant resources in order to comply with their new obligations. Congress imposed these burdens on the ILECs because, without them, the result would have been a few competitive carriers building limited facilities in a few large cities, just as they had been doing before the 1996 Act was adopted. The new burdens and obligations imposed on the ILECs facilitated new entry by enabling new entrants to develop the customer base, back-office systems, regional presence, and network infrastructure to support extensive new facility deployment throughout the United States over the long term. Deregulating the ILECs' local exchange networks and operations would take the industry back to precisely where it was before Congress adopted the 1996 Act – little competition; technological stasis; high retail prices for local services; and sluggish infrastructure development.

A. The Act Does Not Authorize the Commission to Discriminate Against Entry by Means of UNEs or Resale in Favor of the Creation of New Facilities.

A central question for the Commission in determining whether to mandate the availability of a UNE should be whether the UNE will promote the rapid development of competition by a multitude of providers (*i.e.*, is availability of the UNE "rationally related to the goals of the [1996 Telecommunications] Act"?).[3] As the FCC has often recognized, the Act

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2 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15812-14, ¶¶ 618-625 (1996) (subsequent history omitted) ("*Local Competition Order*").

3 *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999).

contemplates three different market entry strategies – service resale, UNEs (wholesale entry) and facilities-based provision of service.[4] These options replicate market entry strategies available to carriers in competitive telecommunications markets, such as long distance.

The Act "neither explicitly nor implicitly expresses a preference for one particular entry strategy."[5] Instead, its goal is to eliminate all barriers to entry and to lower entry costs wherever possible, in order to maximize the potential competitive benefits to telecommunications subscribers. In short, the principal goal of the Act – and therefore, the Commission's primary obligation in implementing the Act– is to "ensure that *all* pro-competitive entry strategies may be explored."[6] Judging by its recent statements and actions, the Commission appears now to believe that facilities-based entry is to be preferred despite the statutory mandate of equal treatment for all three options. Any agency decision based on a desire to elevate one method of entry or discourage other entry methods is contrary to Congressional intent.

Although facilities deployment is the long-term objective of many competitive carriers, it bears emphasis that the Act does not require new entrants to own facilities nor does it favor facilities-based entry over other entry strategies based on resale or UNEs.[7] Certainly, the Act does not permit the Commission to discriminate against UNEs or resale in an effort to encourage the short-term construction of new facilities at all costs. The Act encourages UNE- and resale-based entry strategies because Congress knew that facilities-based competition would

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4 *See, e.g., Local Competition Order,* 11 FCC Rcd 15499, 15509, ¶12.

5 *Id.*

6 *Id.* (emphasis added).

7 *See Iowa Utilities Bd.,* 525 U.S. at 371-72 (noting that the Act permits competitors to provide service by leasing UNEs from the ILEC).

not develop unless UNEs and resale are available to all requesting carriers. Accordingly, the Commission's interpretation of the "impair" standard must give substance to the standard without forcing carriers into a one-size-fits-all facilities-deployment business plan. Rather, the Commission must strictly adhere to both the letter and the spirit of the Act, the principal goal of which is to ensure that *all* pro-competitive entry strategies are available to providers of local telecommunications services.[8]

It is important to ensure the simultaneous availability of all three entry strategies. Each entry strategy has different strengths and weaknesses, and therefore is used for different purposes by different carriers (or, more often, in different circumstances by the same carrier). Moreover, the availability of all three entry strategies opens competition to the broadest array of providers and does not favor one type of service provider over another.

Total service resale enables a carrier to acquire customers at very low cost and often is the quickest method of entering a new market. However, resale does not allow differentiation of service, nor does it allow an entrant to create new services or products in competition with the ILEC. Moreover, resale suffers from several disadvantages. A resale carrier cannot collect access charges, and the wholesale discounts afforded under the statutory avoided-cost methodology often are inadequate to provide a meaningful positive margin for resale operations.[9] As a result, resale typically is suited to entrants desiring to enter a market immediately before migrating to a UNE- or other facilities-based strategy, or who desire to fill in geographic or product coverage caps in their business plans.

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8 *See* S. Conf. Rep. No. 104-230, 104th Cong. 1 (1996) (explaining that the 1996 Act erects a "procompetitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

9 47 U.S.C. § 252(d)(3).

Sections 251(c)(3) and 252(d)(1) create a wholesale market entry option based on UNEs that enables the carrier to differentiate its services from those of the ILEC, construct new and innovative services and related capabilities, and collect access charges. This option replicates the type of wholesale market that would exist in a fully competitive telecommunications market. However, this option does not permit entry as quickly as total service resale, and it requires more capital up-front and on an ongoing basis than the resale option. The UNE regime can support a variety of different entry models. Some entrants employ the so-called UNE Platform, which enables them to assemble local services as a combination of UNEs, while other entrants use loops, collocation arrangements, and transport to provide local and other services to subscribers. Still other entrants desire to use the EEL to provide local services, although the FCC's restrictions on EELs have severely undercut this model.

As with total service resale, the UNE model is used by some carriers on an interim basis while it seeks to transition to the use of its own duplicate facilities and capabilities when it makes technical, operational and economic sense to do so. By contrast, other carriers intend to rely upon ILEC-provided UNEs to free their capital for the development of innovative technologies and products that enhance the value of their standard telecommunications service offerings. These entities simply need the underlying UNE capabilities so that their innovative products can operate properly. This type of entry is illustrated by CompTel member companies such as Z-Tel Communications, Inc. ("Z-Tel"), a carrier that focuses on the development of a sophisticated application control system that "overlays" the traditional network to provide customers an integrated voice, data and messaging environment. Essentially, Z-Tel uses the

UNE Platform in combination with its software in a creative manner to offer customers a new and innovative product that is not even available from the ILEC.[10]

Finally, depending upon legal, operational or economic barriers, facilities-based entry also is an entry strategy, as it was prior to the adoption of the 1996 Act. Facilities-based entry is the most capital intensive entry strategy, and it also is the most time-consuming. Few if any new entrants are in a position to rely entirely upon facilities and capabilities which they have built and owned. The only notable examples are the cable overbuilders, also known as broadband service providers, and certain retail and wholesale carriers focusing on high-capacity last-mile connectivity, including, for example Cogent. However, even these carriers need access to UNEs.

Critically, in a fully competitive telecommunications market, each of these three options will be available simultaneously in all geographic areas. It is not the case that as a market becomes more competitive all providers migrate to a facilities-based strategy. In fact, the opposite is true. As the market becomes more competitive, multiple *wholesale* suppliers develop, and entry via wholesale facilities (*i.e.*, UNEs), total service resale, and hybrid operations expands. While many new competitors ultimately become facilities-based in their own right, some become only partially facilities-based while others focus their efforts and funds on innovation and competition in software-related applications and the packaging of retail services. A real-world example is the long distance market, where a viable wholesale market enabled long distance carriers to enter the market at minimum cost, and to deploy their own

[10] Z-Tel's flagship residential product, Z-LineHOME, consists of a bundled package of local, long distance, and enhanced services, including voicemail, caller ID, call waiting, "follow me," and Internet features and functions. Z-Tel also offers in some areas a small business product, Z-LineBUSINESS, which provides small businesses with the "intelligent dial-tone" services generally available only to large business.

facilities gradually based on their needs and economic efficiency. The result today is a fully-competitive long distance voice and longhaul data marketplace characterized by carriers employing the full range of business plans and entry options over multiple networks that are the Nation's only, and most pervasive, examples of all-optical network deployment.

B. New Entrants Need UNEs in Order To Implement Business Plans To Enter the Local Market and Ultimately To Construct Alternative Networks.

Removing UNEs from the mandatory list, or restricting their use by requesting carriers, will create a barrier to new entry and constitute a severe disincentive for competitive carriers to invest in alternative facilities-based networks. ILEC-supplied UNEs are a critical wholesale input without which the vast majority of new entrants cannot hope to sustain entry into the local exchange market. As proof of the important role played by wholesale inputs, the Commission need look no further than the long distance market. The Commission has credited the wholesale market as being "*a major reason* for the increased competition in the long distance services market."[11] The same is true with local competition, and competitors must have access to the full range of UNEs at TELRIC rates without any restrictions in order to sustain entry and place themselves in a position to begin constructing their own facilities.

One example of the role played by UNEs in a local market entry strategy is the so-called "smart build" strategy that has been favored by analysts and implemented by several new entrants.[12] Under a smart build strategy, the competitive carrier enters the market with a minimal capital investment and leases the necessary UNEs from the ILEC. As the business

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11 *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Memorandum and Order, 13 FCC Rcd 18025, 18051, ¶ 42 (1998) (emphasis added).

12 "The CLEC is Dead! Long Live the CLEC!", AG Edwards, June 20, 2001 at 2, 5.

grows and customers are added, the competitive carrier spends more capital to build out its own network and lessen its dependence on the ILEC. Importantly, under the "smart build" strategy, a competitive carrier may install its own switches, although profit margins often remain low during the early years while the carrier is still ramping-up customers and traffic volumes. Profit margins only begin to improve as traffic grows, the competitive carrier's network is built out, and customers are transitioned onto the competitive carrier's network. This "smart build" entry strategy will not work if the Commission removes UNEs or restricts their usage by requesting carriers.

In the local market, the Act compels ILECs to be the wholesale providers because they are the only carriers in a position to do so. The ILECs' networks enjoy "economies of density, connectivity, and scale" that cannot be duplicated by competitors, now or in the foreseeable future.[13] As has been widely acknowledged, and scarcely could be contested with a straight face, ILECs are "one of the last monopoly bottleneck strongholds in telecommunications."[14] In order for competitors to have a wholesale entry strategy in the local market today, they must obtain access to UNEs.

There can be no doubt that requiring new entrants to build their own facilities as a condition of entry is likely to deter entry altogether. Congress adopted the 1996 Act based on its recognition that it would undermine competition and discourage the build-out of our national infrastructure to require new entrants to build their own networks from scratch at the outset. As even Verizon concedes, "[b]uilding network components before a customer base has been

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13 *FNPRM*, ¶ 27 (citing *Local Competition Order*, ¶ 11).

14 *Local Competition Order*, 11 FCC Rcd at 15506, ¶ 4.

established . . . places a strain on capital resources and may eventually lead to failure."[15] Few companies (especially smaller businesses) will be interested in entering the market if they must make such an enormous up-front capital investment to inefficiently serve relatively small customer bases. Particularly given the scarcity of capital investment over the past two years in the telecommunications industry, a policy requiring full facilities-based entry from the get-go is the functional equivalent of a policy against new entry.

It is a time-tested business strategy for carriers to acquire capacity and facilities through lease or resale in order to assemble a customer base, establish a revenue stream, and attract capital for expansion. Carriers then substitute their own network capabilities and functionalities on an incremental basis over time when and if it makes sense to do so. Through this approach, a carrier who enters the market initially as a pure resale provider can develop over time into a significant facilities-based carrier. For this process to work effectively, it is critical that carriers have the freedom to enter the market initially through the use of network capabilities and functionalities provided by others. Congress adopted the market-opening provisions in Section 251(c) precisely because it was recognized to be impractical for any new entrant to duplicate the pre-existing ILEC network as a precondition of local market entry.

Although the ILECs argue that local entry through resale or UNEs should be discouraged, the ILECs themselves do not embrace such an imprudent business model when they are new entrants. When the ILECs enter the out-of-region interLATA market, they do not first

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15 *See* Robert W. Crandall, "An Assessment of the Competitive Local Exchange Carriers Five Years After the Passage of the Telecommunications Act," at 6 (June 2001) (submitted by Verizon to the Public Service Commission of Maryland on November 30, 2001 in Case No. 8879). The quoted statement is in stark contrast to Mr. Crandall's unsupported assertion later in the report that "the entrant's best strategy for growth is to build its own facilities." *Id.* at 43. Mr. Crandall's employer, Verizon, does not adhere to that approach when it qualifies as a new entrant in a market.

build-out their own interLATA networks and then seek to obtain the customers and traffic necessary to fill those networks. Rather, the ILECs lease network capacity from pre-existing carriers with the intention of building their own infrastructure when and to the extent that it makes economic and operational sense to do so. (It is worth noting that Verizon is the largest long distance reseller in the country today.) The ILECs who argue that new entrants should be required to build their own networks know that the result of such a misguided industrial policy would be to make new local entry prohibitively expensive and burdensome.[16]

It is not a matter of speculation whether permitting new entry based on leased elements and resale would promote the development of facilities-based alternatives for customers. This approach already has been implemented successfully in the long distance market. Many carriers entered the market as pure resellers and transformed themselves over time into predominantly facilities-based carriers. The result is that the United States has a robust and diverse nationwide long-haul backbone network that is the envy of the world. That network would never have come into existence if the Commission had sought to discourage or prevent new entrants from initially operating on a resale or leased-functionality basis. The Commission cannot achieve the same result for the local exchange market unless it fully and vigorously implements the statutory UNE regime in Sections 251(c)(3) and 252(d)(1).

16 The Commission should pay heed to Alan Greenspan's comment that "[w]hen you strip away the philosophical paraphernalia, industrial policy is a mechanism by which the politically powerful get their hands in the till." *See* W. Adams & J. Brock, The Bigness Complex, at 351 (Pantheon Books 1986). The ILECs' proposed industrial policy is an effort to insulate themselves from competitive entry.

C. The 1996 Act Prohibits the Commission From Considering Whether Requiring ILECs To Unbundle Network Elements May Deter Investment by ILECs or Requesting Carriers.

Section 251(d)(2) directs the Commission, in determining which network elements the ILECs must make available on an unbundled basis pursuant to Section 251(c)(3), to "consider, *at a minimum*, whether – (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[17] The plain language of the statute thus enumerates two factors that the Commission must consider in determining which network elements must be unbundled, and authorizes the Commission to identify and consider additional factors in determining which network elements must be unbundled. The Commission took this same reasonable inference in the *UNE Remand Order*, concluding that, while it must consider the "necessary" and "impair" standard, it is not barred from considering additional factors in making its unbundling determination.[18]

1. The Commission cannot consider factors that are fundamentally inconsistent with the 1996 Act.

Congress provided the Commission with discretion to consider additional factors in making its unbundling determination under Section 251(d)(2), but this discretion is not unlimited. Specifically, the Commission has no authority to rely on factors that Congress did not

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17 47 U.S.C. § 251(d)(2)(A),(B) (emphasis added).

18 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rule Making, 15 FCC Rcd 3696, 3725, ¶ 51 (1999) ("*UNE Remand Order*"). *Cf. Allied Local and Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 78 (D.C. Cir. 2000), *citing George Warren Corp. v. EPA*, 159 F.3d 616, 624 (D.C. Cir. 1998) (noting that court's "usual reluctance to infer from congressional silence an intention to preclude the agency from considering factors other than those listed in a statute").

intend the Commission to consider. For example, Congress did not intend for the Commission to consider factors that are inherently inconsistent with the fundamental assumptions upon which Congress founded the Act.[19] Therefore, the Commission cannot rely on a factor that is based on an assumption which is inherently inconsistent with an assumption upon which Congress based the Act, even if the Commission does not agree with the assumption underlying the Act.

2. It is fundamentally inconsistent with the 1996 Act to consider whether requiring ILECs to unbundle a network element may deter investment by both ILECs and other carriers.

In the *Notice*, the Commission seeks comment on whether it can "balance the goals of sections 251 and 706 by encouraging broadband deployment through the promotion of local competition and investment in infrastructure."[20] The Commission then notes that "some parties have argued that imposing unbundling requirements on incumbent LECs, particularly with respect to innovative, new facilities, may deter investment by both incumbent LECs and others" before asking a series of questions about the type of use restrictions that the Commission could impose based on this unsupported assertion.[21]

In carrying out its duties under Section 251(d)(2) to determine which network elements the ILECs must unbundle, the Commission cannot consider whether requiring ILECs to unbundle a network element may deter investment by both ILECs and other carriers.[22] Congress did not intend for the Commission to entertain such a proposition, because it is inherently

19 *Allied Local and Reg'l Mfrs. Caucus*, 215 F.3d at 78, *citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (ruling that "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider").

20 *Notice*, 16 FCC Rcd at 22792, ¶ 23.

21 *Id.* at 22792-96, ¶¶ 23-30.

22 *Id.* at 22792, ¶ 23.

inconsistent with a fundamental assumption upon which the Act is based. The Commission cannot purport to implement a statutory regime by dismantling it based on the assumption that the regime will achieve the opposite result intended by Congress. Congress adopted the UNE regime because it will promote competition and network investment, and the FCC cannot use its limited authority to implement this regime by removing UNEs, or restricting their use, based on the theory that UNEs undermine competition and retard network investment. In effect, the FCC would be exercising its forbearance authority in violation of Section 10(d) were it to use this factor to justify the removal or paring back of the mandatory UNE list.

Congress designed the Act to foster the rapid development of competition in the local telephone services market "by fundamentally changing the incentives for market entry and by eliminating remaining monopoly bottlenecks."[23] Thus, the Act seeks "to shift monopoly [telecommunications] markets to competition as quickly as possible."[24] Congress based the Act on the fundamental assumption that requiring the ILECs to provide nondiscriminatory access on

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23 *AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 21438, 21465, ¶ 36 (1998). *See* Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat 56, 56 (stating that the purpose of the Act is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"); *Iowa Utils. Bd.*, 525 U.S. at 371; *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857-58 (1997). As the legislative history explains, the Act creates "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. 104-458, at 113 (1996), *reprinted in* 1996 USCCAN 124, 124 (Joint Explanatory Statement of the Committee of Conference); *see also* Bruning, *The Telecommunications Act of 1996: The Challenge of Competition,* 30 Creighton L. Rev. 1255, 1256 (1997) (describing the Act as intended "(1) to promote competition and reduce regulation to secure lower prices and higher quality services for American telecommunications consumers, (2) to encourage the rapid deployment of new telecommunications technologies, and (3) to implement policies that will prevent harm to consumers from the implementation of competition").

24 H.R. Rep. No. 104-204, at 89 (1995).

an unbundled basis to network elements would foster the rapid development of competition in the local telephone services market. This assumption is reflected in the Act's language, structure, and legislative history.

a. Unbundling Obligations of Section 271

Section 271 confirms that Congress based the Act on the assumption that mandatory unbundling requirements facilitate competition. Congress designed Section 271 to facilitate competition in the local telecommunications market by requiring Bell Operating Companies ("BOCs") to satisfy a "competitive checklist" before they can provide in-region, interexchange services. The "competitive checklist" requires BOCs to provide unbundled access to local loop, local transport and local switching before they can provide in-region, interexchange services, and to continue providing unbundled access to these network elements after receiving Section 271 authorization. The BOCs must provide nondiscriminatory access to these network elements on an unbundled basis[25] at TELRIC rates.[26]

The duty to provide unbundled access to local loop, local transport and local switching under Section 271 is absolute: the BOCs must provide access to these network elements regardless of whether the network elements satisfy the impair standard of Section 251(d)(2).[27] The Commission has no authority under Section 271 to place conditions or limits on the duty of a BOC to provide unbundled access to local loop, local transport and local switching as required by the "competitive checklist." This point was so important to Congress that it added

25 *See* 47 U.S.C. § 271(c)(2)(B)(ii) (requiring BOCs to provide nondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3)).

26 *See* 47 U.S.C. § 271(c)(2)(B)(ii) (requiring BOCs to provide nondiscriminatory access to network elements in accordance with the requirements of section 252(d)(1)).

27 *See Notice*, ¶ 72 (seeking comment on the relationship between section 271(c)(2)(B) and sections 251(d)(2) and 251(c)(3)).

Section 271(d)(4), which provides that the "Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)."[28] Congress emphasized the importance of this unbundling requirement by explicitly forbidding the Commission from exercising its forbearance authority with respect to Section 271 until both Section 251(c) and Section 271 have been fully implemented.[29]

The absolute unbundling duty of a Bell Company does not end once its application for interLATA authority is granted. The Act contains several provisions to ensure that the Bell Companies continue to provide nondiscriminatory access to UNEs in accordance with the competitive checklist.[30] Section 271(d)(6), for example, provides the FCC with enforcement ability following a grant of interLATA authority.[31] Should the Commission determine that a Bell Company has "ceased to meet" any of the enumerated conditions, it may, *inter alia*, suspend or revoke such approval.[32] In its orders granting interLATA authority, the Commission has explicitly recognized that the incumbent's network element unbundling obligations do not end when their in-region interLATA authority begins.[33] "[W]e wish to emphasize that grant of this [interLATA] application may close this chapter of the proceeding, but it is not the end of the story. Bell Atlantic must continue to comply with the checklist

28 47 U.S.C. § 271(d)(4).

29 47 U.S.C. § 160(d).

30 47 U.S.C. §271(c)(2)(B).

31 47 U.S.C. §271(d)(6).

32 47 U.S.C. §271(d)(6)(A).

33 *See, for example, Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 3961, 4164, ¶¶ 16, 429 (1999) ("*New York 271 Order*"), *aff'd*, *AT&T v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

requirements."[34] More recently, the Commission has reaffirmed the requirement of ongoing performance, as part of its first biennial review of a Bell Company's continued compliance with the Act.[35]

The decision by Congress to impose an absolute unbundling obligation upon the most ubiquitous ILECs in the nation – the Bell Companies – with respect to three of the most important network elements – loops, transport and switching – reflects the fundamental assumption upon which Congress based the Act: mandatory unbundling fosters the rapid development of competition in the local telephone services market. This fundamental assumption is inherently and irreconcilably inconsistent with the unsupported claim by some parties that imposing unbundling requirements on incumbent LECs will harm competition by deterring investment by both incumbent LECs and other carriers. If Congress had intended for the Commission to consider whether imposing unbundling requirements upon ILECs would harm competition by deterring investment, or even viewed this as a possibility, it would not have imposed an absolute unbundling duty on the Bell Companies and prohibited the Commission from exercising its forbearance authority to limit or remove this unbundling duty.

b. Unbundling Obligations of All Incumbent LECs

The language and structure of the rest of the Act confirm what Section 271 demonstrates: Congress based the Act on the assumption that mandatory unbundling fosters the rapid development of competition in the local telephone services market. The Commission has

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34 *New York 271 Order*, 15 FCC Rcd at 3961. ¶ 16. It is for this reason that the Commission "strongly encourages" post-entry enforcement. *Id.* at ¶ 429. By no small coincidence, every successful interLATA application has contained a post-entry performance assurance plan.

35 *See Common Carrier Bureau Seeks Comment on Verizon Section 272 Compliance Biennial Audit Report*, 16 FCC Rcd 12642 (2001).

recognized that the UNE regime "serves a crucial role in opening local markets to competition."[36] In creating the UNE regime, Congress defined "network elements in Section 153(29), established the terms and conditions pursuant to which ILECs must make UNEs available in Section 251(c)(3), and instructed the Commission to identify which network elements must be made available to requesting carriers on an unbundled basis by applying the impair standard in Section 251(d)(2).

Section 153(29) of the Act defines "network element" as a "facility or equipment used in the provision of a telecommunications service," and it makes clear that the term includes all "features, functions, and capabilities that are provided by means of such facility or equipment."[37] The plain language of the definition does not permit any distinction based upon age of the facility, the type of service that the equipment is capable of providing (*e.g.*, broadband services), or the type of technology that the facility or equipment utilizes. The Commission has recognized this fact with respect to services, explaining that "network elements are defined by facilities or their functionalities or capabilities, and thus, cannot be defined as specific services."[38] Thus, for example, "[w]hen interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access 'services,'" or any other particular "service."[39] Instead, the carriers are purchasing access to a functionality, without regard to the technology underlying that functionality, that can be used to provide any type of telecommunications service.

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36 *See* Brief for Respondents, *United States Telecom Association v. FCC*, Nos. 00-1015 & 00-1025, 4 (D.C. Cir.).

37 47 U.S.C. §153(29).

38 *Local Competition Order*, 11 FCC Rcd at 15634, ¶ 264.

39 *Id.* at 15679-80, ¶ 358.

Section 251(c)(3) also confirms the fundamental assumption underlying the Act that requiring the ILECs to provide nondiscriminatory access on an unbundled basis to network elements would foster the rapid development of competition in the local telephone services market. In order to foster competition by lowering barriers to entry, Section 251(c)(3) of the Act requires ILECs "to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis."[40] The duty of the ILECs to provide unbundled access to that network element under Section 251(c)(3) is absolute. Because Congress assumed that requiring ILECs to offer nondiscriminatory access to UNEs would facilitate competition, Section 251(c)(3) provides no mechanism to consider the effect of the unbundling obligation on the investment incentives of ILECs or others.

The Commission has no discretion under Section 251(c)(3) to limit or modify the terms and conditions pursuant to which ILECs must make UNEs available.[41] Likewise, the Commission has no discretion under Section 153(29) to limit or modify the definition of "network element." Therefore, the Commission's sole obligation under Section 251(d)(2) is to identify which network elements, as defined in Section 153(29), the ILECs must make available on an unbundled basis under the terms and conditions mandated by Section 251(c)(3).

The plain language of Section 251(c)(3) only requires the Commission to apply the impair standard when determining which network elements the ILECs must offer on an unbundled basis in accordance with the terms and conditions mandated by Section 251(c)(3).

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40 47 U.S.C. §251(c)(3). That provision also entitles requesting carriers to obtain and use UNEs in combinations to provide "such telecommunications service." *Id.*

41 *See, e.g.*, 47 U.S.C. § 160(d).

Although the Commission can consider additional factors, Section 251(d)(2) does not require the Commission to do so. Accordingly, the Commission would fully satisfy the requirements of Section 251(d)(2), and thus the Act, by considering only the impair standard when determining what network elements the ILECs must offer on an unbundled basis under the terms and conditions of Section 251(c)(3).

The impair standard in Section 251(d)(2) reflects the assumption that requiring ILECs to offer nondiscriminatory access to UNEs facilitates competition and creates incentives for investment. The standard focuses solely on the effect that lack of access to a particular network element would have on the ability of a requesting carrier to provide telecommunications service, not on the effect of requiring the ILEC to provide unbundled access to that network element on the incentives of the ILEC, the requesting carrier or others. This is because Congress assumed that the unbundling requirement would foster competition rather than harm it by creating disincentives for investment. Congress emphasized the importance of this unbundling requirement by explicitly forbidding the Commission from exercising its forbearance authority with respect to Section 251 until both Sections 251 and 271 have been fully implemented.[42]

3. Section 706 does not provide the Commission with independent authority to consider "additional factors" under Section 251(d)(2) that are fundamentally inconsistent with the 1996 Act itself.

In the *Notice*, the Commission asks for comment on whether it can "balance the goals of sections 251 and 706 by encouraging broadband deployment through the promotion of local competition and investment in infrastructure."[43] This request misleadingly implies that the

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42 47 U.S.C. § 160(d).

43 *Notice*, 16 FCC Rcd at 22792-93, ¶ 23.

goals of Section 251 and Section 706 are in conflict, or that the assumptions underlying Sections 251 and 706 are different.[44] Nothing could be further from the truth. Sections 251 and 706 are based on the same assumption, and Section 706 explicitly states that it is consistent with Section 251. Specifically, Section 706 directs the Commission to

> encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, ***in a manner consistent with . . . regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.***[45]

Thus, the plain language of Section 706 makes clear that the Commission can only encourage the deployment of advanced telecommunications capability by following the principle upon which Congress based Sections 271 and 251: requiring ILECs to provide nondiscriminatory access on an unbundled basis to network elements fosters the rapid development of competition. Congress knew that fostering competition was the best way to encourage the deployment of advanced telecommunications capabilities.

Congress intended the Commission to consider the goals of Section 706 as an "additional factor" when determining under Section 251(d)(2) which network elements ILECs must unbundle. However, consideration of this factor could only lead the Commission to increase the unbundling obligations of the ILECs, because Section 706 is based on the

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44 The Commission repeatedly has addressed whether Section 706 constitutes an independent grant of forbearance authority. After a thorough examination of the statutory language, legislative history and congressional intent, the Commission concluded that "section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods." *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24044, ¶ 69 (1998), *aff'd on reconsideration*, 15 FCC Rcd 17044 (2000).

45 Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S.C. § 157 (47 U.S.C. § 157 nt) (emphasis added).

assumption that requiring ILECs to provide nondiscriminatory access on an unbundled basis fosters competition. In any event, the Act prohibits the Commission from reducing the ILECs' unbundling obligations based on the goals of Section 706, because the false assumption that reducing unbundling obligations somehow encourages the deployment of advanced telecommunications services is fundamentally inconsistent with Sections 271 and 251, as well as Section 706 itself. Congress emphasized this by explicitly requiring the Commission to implement Section 706 in a manner consistent with its forbearance authority, which the Commission cannot exercise until both Sections 251 and 271 have been fully implemented.

4. The 1996 Act provides no mechanism for the Commission to consider whether requiring ILECs to unbundle network elements harms competition by creating disincentives for investment.

None of the market-opening provisions in the Act grants the Commission discretion to consider whether imposing unbundling requirements on ILECs, particularly with respect to innovative, new facilities, may deter investment by both ILECs and others. The Commission has no discretion under Section 153(29) to limit or modify the definition of "network element." The Commission has no discretion under Section 271 to limit or modify the unbundling obligations of the BOCs. The Commission has no discretion under Section 251(c)(3) to limit or modify the terms and conditions pursuant to which ILECs must make UNEs available. Therefore, the Commission cannot limit the unbundling obligations of ILECs pursuant to Section 706, because the Commission has no discretion under Section 706 to encourage the deployment of advanced telecommunications capabilities in a manner that is inconsistent with Sections 271, 251 or 153. Although the Commission has discretion to consider "additional factors" when identifying pursuant to Section 251(d)(2) which network elements ILECs must unbundle, the Commission has no discretion to consider factors that Congress did not intend it to consider.

Therefore, the Commission has no discretion to consider whether imposing unbundling requirements on ILECs may deter investment, because the rest of the Act – including Sections 271, 251(c), 153 and 706 – demonstrates that Congress did not intend for the Commission to consider this factor.

CompTel agrees with Congress that requiring ILECs to offer nondiscriminatory access to network elements on an unbundled basis is the best way to facilitate long-term facilities-based competition. However, even if Congress' conclusion were wrong, and it is not, the Commission could not substitute its own assumption that imposing unbundling requirements on ILECs may deter investment. Indeed, "there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits."[46] Although "agencies may safely be assumed to have discretion to create exceptions at the margins of a regulatory field, they are not thereby empowered to weigh the costs and benefits of regulation at every turn; agencies surely do not have inherent authority to second-guess Congress' calculations."[47] Therefore, the Commission cannot second-guess Congress here by considering whether imposing unbundling requirements on ILECs may deter investment when applying the necessary and impair standard under Section 251(d)(2).

D. Congress Added the "At a Minimum" Language to Section 251 to Authorize the Commission to Make More UNEs Available, not Less.

Section 251(d)(2) directs the Commission, in determining which network elements the ILECs must make available on an unbundled basis pursuant to Section 251(c)(3), to "consider, *at a minimum*, whether – (A) access to such network elements as are proprietary in

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46 *Public Citizen v. FTC,* 869 F.2d 1541, 1556 (D.C. Cir. 1989), *citing Alabama Power Co. v. Castle,* 636 F.2d 323, 357 (D.C. Cir. 1979).

47 *Public Citizen,* 869 F.2d at 1557.

nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[48] Accordingly, this section requires the Commission to apply the impair standard in determining which network elements must be unbundled. By adding the "at a minimum" language to Section 251(d)(2), Congress authorized the Commission to identify and consider additional factors *after* applying the impair standard when determining which network elements must be unbundled.

Congress authorized the Commission to identify and consider additional factors under Section 251(d)(2) so that the Commission can require the ILECs to unbundle network elements that do not satisfy the impair standard where unbundling would further the goals of the Act. As explained above, Congress based the Act on the fundamental assumption that requiring the ILECs to provide nondiscriminatory access on an unbundled basis to network elements would foster the rapid development of competition in the local telephone services market. Congress built the Act around the UNE requirement, imposing absolute unbundling requirements under both Section 271 and Section 251, and Congress made clear throughout the Act that the unbundling requirements are entirely consistent with all of the Act's goals. Congress emphasized this point by including specific language in the Act that prohibits the Commission from exercising its forbearance authority to remove or modify the unbundling requirements.[49] Accordingly, Congress granted the Commission authority to impose additional unbundling requirements when necessary to achieve the Act's goals.

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48 47 U.S.C. § 251(d)(2)(A),(B) (emphasis added).

49 *See, e.g.*, 47 U.S.C. § 160(d) (limiting forbearance authority); 47 U.S.C. § 271(d)(4) (limiting authority to modify or lessen unbundling requirements under the competitive checklist); 47 U.S.C. § 157 nt (stating that encouraging broadband deployment is consistent with other sections of the Act, including Sections 271 and 251).

The language and structure of the Act make clear that Congress did not intend for the Commission to rely on "additional" factors to "remove" network elements from the mandatory UNE list. Congress did not intend to undermine the explicit prohibitions that it placed on the Commission's authority to limit the unbundling obligations of the BOCs and the ILECs by granting the Commission implicit authority to limit those unbundling obligations pursuant to Section 251(d)(2). Accordingly, UNEs that satisfy the impair standard represent the minimum unbundling requirement that ILECs must satisfy under the Act, and thus the Commission can only add UNEs based on a consideration of additional factors under Section 251(d)(2), not remove them.

E. The Commission Cannot Forbear from Section 251 or Section 271 Until Both Sections Have Been Fully Implemented

In adopting the 1996 Act, Congress explicitly limited the Commission's ability to forbear from applying the requirements of Section 251 and 271. Specifically, apart from the exemptions specified in Section 251(f) for rural telephone companies, the Commission may not forbear from applying the requirements of Sections 251(c) or 271 until it determines that "those requirements" have been fully implemented.[50] Thus, the Commission cannot forbear from applying the requirement of *either section* until *both sections* have been fully implemented.

Even though we have passed the sixth anniversary of the Telecommunications Act of 1996, it is abundantly clear that the requirements of Section 251(c) have not been "fully implemented" by the ILECs. Likewise, the requirements of Section 271 have not been fully implemented, even by those Bell Companies that have received Section 271 authority, as recent

[50] 47 U.S.C. § 160.

enforcement proceedings demonstrate.[51] Therefore, the Commission cannot rely on its forbearance authority to limit the unbundling obligations of ILECs under Section 251(c) or BOCs under Section 271.

II. THE COMMISSION SHOULD FOSTER BROADBAND DEPLOYMENT AS DIRECTED BY SECTION 706, WHICH CONGRESS BASED ON THE ASSUMPTION THAT MAKING UNEs AVAILABLE FOSTERS BROADBAND DEPLOYMENT BY FACILITATING COMPETITION

A. The Commission Should Encourage *Efficient* Investment in Broadband Infrastructure and Services.

In the *Notice*, the Commission seeks comment on how to promote facilities-based investment in the broadband market segment.[52] CompTel shares the Commission's goal of fostering the deployment of facilities necessary to provide broadband services, and urges the Commission to achieve this goal by adhering strictly to both the letter and the spirit of the 1996 Act, which Congress designed to promote investment in broadband infrastructure and services ***where it is efficient and cost-effective to do so.*** The 1996 Act reflects the wisdom that regulatory policies which encourage investment for its own sake are misguided, because they distort market signals, which ultimately harms carriers and consumers alike. Any policy that encourages broadband investment for its own sake would undermine the nascent broadband market segment rather than promote its further growth.

CompTel does not believe that we face a broadband deployment crisis today which justifies draconian regulatory "fixes." There has been an unprecedented deployment of

51 *See, e.g., Bell Atlantic-NY Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 5413 (2000).

52 *See, e.g., Notice*, 16 FCC Rcd at 22792-93, ¶¶ 23-24.